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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendation

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted one recommendation at its Sixty-second Plenary Session. The appended recommendation addresses: Promoting Accuracy and Transparency in the Unified Agenda.

FOR FURTHER INFORMATION CONTACT: Reeve Bull, Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Sixty-second Plenary Session, held June 4, 2015, the Assembly of the Conference adopted one recommendation.

Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*. This recommendation offers suggestions for improving the accuracy and transparency of the Unified Agenda of Federal Regulatory and Deregulatory Actions. Among other things, it urges agencies to consider providing relevant updates between Agenda reporting periods, offers

recommendations for ensuring that Agenda entries are properly categorized by projected issuance date and status, and encourages agencies to provide notice when entries are removed from the Agenda.

The Appendix below sets forth the full text of this recommendation. The Conference will transmit it to affected agencies and the Congress. The recommendation is not binding, so the entities to which it is addressed will make decisions on its implementation.

The Conference based this recommendation on a research report that is posted at: www.acus.gov/62nd. A video of the Plenary Session is available at: livestream.com/ACUS/62ndPlenary, and a transcript of the Plenary Session will be posted when it is available.

Dated: June 22, 2015

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General Counsel.

APPENDIX--RECOMMENDATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2015-1

Promoting Accuracy and Transparency in the Unified Agenda

Adopted June 4, 2015

The Unified Agenda of Federal Regulatory and Deregulatory Actions (typically known simply as the “Unified Regulatory Agenda” or “Unified Agenda”) is an important mechanism by which federal agencies inform the public of upcoming rules. Required to be published on a

semiannual basis, the Unified Agenda represents a joint enterprise of the Office of Information and Regulatory Affairs (OIRA), the Regulatory Information Service Center (RISC) within the General Services Administration, and the individual rulemaking agencies working on rules. The database used to produce the Unified Agenda is the RISC-OIRA Consolidated Information System (ROCIS). Publishing upcoming rules in the Unified Agenda satisfies requirements of both the Regulatory Flexibility Act¹ and Executive Order 12,866.²

The Unified Agenda serves the useful function of notifying stakeholders and the general public of upcoming regulatory actions.³ In an increasingly globalized world, this notice-serving function is valuable not only for domestic stakeholders but also for foreign businesses and regulators, who must remain apprised of developments in U.S. policymaking in order to coordinate effectively in promoting international regulatory cooperation.⁴ Thus, it is critical to ensure that the information in the Unified Agenda is as accurate as possible to allow regulators and stakeholders to plan accordingly.

At the same time, it is unrealistic to expect that agencies can provide perfectly accurate predictions of upcoming actions. There will always be some uncertainty, given the dynamic environment in which agencies operate, and the information contained in the Unified Agenda will never achieve total predictive accuracy. The Agenda itself states that agencies are permitted to issue rules that were not predicted by the Agenda and are not required to issue rules that were so predicted. In addition, agencies may have limited time or resources to prepare Agenda entries.

¹ 5 U.S.C. § 602(a).

² Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993).

³ See Curtis W. Copeland, The Unified Agenda: Proposals for Reform 7–8 (Apr. 13, 2015), *available at* <https://www.acus.gov/report/final-unified-agenda-report> (cataloguing various stakeholders’ expressions of support for the Unified Agenda and recent uses thereof).

⁴ See Administrative Conference of the United States, Recommendation 2011-6, *International Regulatory Cooperation*, ¶ 3, 77 Fed. Reg. 2257, 2260 (Jan. 17, 2012) (advocating the establishment of common regulatory agendas among trading partners).

The Unified Agenda functions reasonably well as a predictor of some agency actions, but is less accurate in other areas.⁵ For example, estimated action dates may prove incorrect, the significance of a regulation may be misclassified, and jointly issued rules may inappropriately be characterized differently by different agencies. Additionally, some rules are classified as long-term actions when regulatory activity is imminent, while others remain listed as long-term actions after work on them has ceased. Occasionally, entries are removed from the Unified Agenda without explanation. Finally, a number of regulatory actions have recently been placed in a “pending” category that is not included in the published Unified Agenda.⁶

As technology has evolved, some agencies have begun to provide periodic updates on the progress of their rulemaking efforts on their websites and other media between the semiannual Agenda publication dates. Though this may not prove feasible in all instances, there are steps that agencies, OIRA, and RISC might take to ensure that the public has consolidated access to this information to the extent this updating takes place.⁷

The touchstone of the process should be transparency: although complete predictive accuracy is infeasible, all agencies that contribute to the Unified Agenda should strive to ensure that it offers the most up-to-date, valuable information possible. The following recommendations are designed to identify straightforward, simple steps that OIRA, RISC, and rulemaking agencies can take to enhance the predictive accuracy of the Unified Agenda and ensure that it remains a valuable resource for regulators, stakeholders, and the general public.

Recommendation

1. Federal agencies should take steps to provide on their websites and/or, where appropriate, through other media, periodic updates concerning rulemaking developments outside of the semiannual reporting periods connected with the Unified Agenda. These periodic updates

⁵ See generally Copeland, *supra* note 3.

⁶ One consequence of eliminating the “pending” category and moving all active entries to the public-facing Unified Agenda, as recommended below, may be an increase in the total number of regulations in the Agenda, even though the number of rules under development has not actually increased.

⁷ It may prove especially valuable for agencies’ Unified Agenda entries to provide a link to the rulemaking docket on “regulations.gov.”

would likely focus primarily on concrete actions undertaken in connection with particular rules (e.g., noting if a rule has been issued since the last Agenda), but could also include changes regarding rules still under development (e.g., revisions to predicted issuance dates or significance classification). Each agency's Unified Agenda entry should include a notice of where information about updates can be found; if updates are published on the agency's website, a link to the appropriate webpages should be included in the Unified Agenda. OIRA and RISC should also facilitate sharing among agencies of best practices for providing periodic, digital updates on rulemaking developments.

2. OIRA and RISC should provide a mechanism for linking the information contained in the Unified Agenda and other regulatory data systems (e.g., the *Federal Register* and other parts of ROCIS) that would, where feasible, enable the Agenda information to be updated automatically. For example, if the Unified Agenda indicates that a proposed rule is forthcoming, and that rule is published in the *Federal Register* months before the next edition of the Agenda is issued, the *Federal Register* entry should result in an automatic update to the Agenda.

3. Federal agencies should not keep regulations that are still under active development in a "pending" category. The "pending" category should be included in the published Unified Agenda. OIRA should define the criteria distinguishing between "long term" and "pending" actions.

4. In instances in which a Unified Agenda entry has been in the "proposed rule" or "final rule" stage for three or more Agendas in a row, the agency should reexamine the entry to determine whether action on it is likely in the twelve months after the publication of the most recent Agenda. If not, the agency should reclassify the entry as a "long-term" action or, if the regulatory action is no longer in development, remove it from the Unified Agenda entirely, with the notation described in recommendation 7. If the agency is uncertain as to whether the proposed or final rule might be issued within twelve months, it should provide, where appropriate, an explanation in the associated Agenda entry.

5. To the extent feasible, agencies should ensure that any regulatory actions that are likely to occur in the ensuing twelve months (e.g., hearings or proposed or final rules) are included in the appropriate active "Stage of Rulemaking" category (i.e., the "prerule," "proposed

rule,” or “final rule” stage), rather than in the “long-term” action category. Long-term actions are intended to reflect items that are under development but for which the agency does not expect to undertake a regulatory action in the twelve months after the publication of the most recent Agenda.

6. In instances in which a Unified Agenda entry has been in the “long-term” category for an extended period of time, the agency should reexamine the entry to ensure that it is still under development. If not, the agency should remove the entry from the Unified Agenda, with the notation described in recommendation 7.

7. Unified Agenda entries that have previously appeared in the Agenda should not simply disappear in the next edition. When an agency determines that it no longer intends to pursue any additional rulemaking activity with respect to such an entry, the agency should reclassify the entry as completed and indicate how the action was completed.

8. For rules expected to be jointly issued by more than one agency, the agencies should strive to ensure that the descriptive information provided in the Unified Agenda, including the timing of the rule’s issuance and its classification as a “significant” or “major” regulatory action, is accurate across all of the agencies’ entries. To the extent possible, OIRA and RISC should encourage agencies to publish a single Agenda entry for the joint rule. Where this is not possible, each agency’s Unified Agenda entry should include a link to the other associated entry or entries.

9. At present, the Regulatory Flexibility Act (RFA) elements of the Unified Agenda and associated materials are ambiguous, making it difficult for agencies to know how to respond. For example, it is currently unclear if agencies should indicate whether an upcoming regulatory action is expected to have a significant economic impact on a substantial number of small entities or whether some type of RFA analysis will be conducted. OIRA should change the wording of the RFA elements in the Unified Agenda and associated materials to reflect the intent more clearly and should provide guidance to agencies to ensure that the meaning is clear.

